TAN SOOI SHIN

v.

KOW KEK HING (1)

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[COMPANIES WINDING-UP NO. D3-28-493-89]
16 MARCH 1991

COMPANY LAW: *Petition for winding up - Deadlock - Lack of trust and confidence between shareholders - Power of Court to order sale of shares from one shareholder to another - Whether there are statutory provisions allowing interference by the Courts - Companies Act 1965, ss. 181, 218, 221(1).*

CIVIL PROCEDURE: *Petition for winding up - Assessed on affidavits - Discretion of Court to allow oral evidence - Cross-examination of deponents of affidavits.*

The petitioner and the applicant K are the only directors and equal shareholders of Tako Corporation Sdn. Bhd., TC. The petitioner applied under s. 218(1)(ii) of the Companies Act 1965 (the Act) to wind-up TC on the basis that there is a deadlock and a complete lack of trust and confidence between him and K.

K opposed the petition and asked the Court to dispose of the petition by ordering the petitioner to sell all the petitioner's shares in TC to K at a price to be decided by an independent valuer.

The questions before the Court was whether it had jurisdiction to order a sale of shares in a s. 218 petition as is available in a s. 181 application and further whether the Court has a discretion to allow K's application to cross-examine deponents of affidavits filed in support of the petition and/or adduce oral evidence.

Held:

[1] Where statutory powers are designed to interfere with basic and inherent rights of parties they must be clearly and expressly stated as has been done in s. 181(2) of the Act. The arrangements of the words used make it clear that "with or without costs" has reference to the power to dismiss the petition, "conditionally or unconditionally" to the power to adjourn the hearing and it follows that "or other order" has reference to the power to the Court to make any interim order. The view that the words "or other order" relates to "interim" orders has no general application as that phrase used is "make any interim or other order" and not "make any interim order" and that there is also a 4th limb to the sub-section *viz.* "or (4) make any other order".

[2] As the legislation had, in s. 181, given certain powers to the Court and had not done so in another section of the same statute, it leads to the inference that it was not intended that such power be given in relation to that latter section. The Court therefore has no jurisdiction to order one member to sell his shares in the company or purchase the shares of another.

[3] As this is a petition, evidence is to be adduced by way of affidavits. However the Court has a discretion whether or not to allow an application for the adducing of oral testimony or for cross-examination of deponents.

[4] If there is a deadlock, it is not relevant as to who is at fault and if the petitioner could not satisfy the Court with affidavits that there was a deadlock situation, the petition would no doubt be dismissed.

[5] In a s. 218 petition the Court has no jurisdiction to order one member to sell his shares in the company or purchase the shares of another.

[K's preliminary objections dismissed with costs.]

For the petitioner - P. Abraham; M/s. Abraham & Partners
For the other applicant - Vadivello (Stanley Chang with him); M/s. Shui Tai & Associates

JUDGMENT

VC George J:

Tan Sooi Shin the petitioner herein and Kow Kek Hing have been and are the only directors and shareholders of Tako Corporation Sdn. Bhd. They hold equal shares. In effect the petitioner says that the relationship between him and Kow Kek Hing deteriorated to such a state that there is a situation of a deadlock and a complete lack of trust and confidence in each other as business partners. He invokes s. 218(1)(ii) of the Companies Act and moves the Court to have the company wound up.

Pending disposal of the petition the petitioner has obtained an order of the Court appointing the official receiver as provisional liquidator.

Kow Kek Hing opposes the petition. By his affidavit in opposition encl. (25), he asks for the petition to be dismissed with costs. However, Counsel for him asks that the Court dispose of the petition by ordering the petitioner to sell all of his shares in the company to his client at a price to be decided by an independent valuer. Counsel for Mr. Kow also says that in any event in disposing of the petition the Court should allow cross-examination of the deponent of the affidavits in support of the petition and allow Mr. Kok to adduce oral testimony of himself and of witnesses he intends to call.

As a preliminary point submissions were made on the following:

(1) Has the Court jurisdiction to order a sale of shares in a s. 218 petition as can be done in a s. 181 application?

(2) In any event should the Court allow Kow's application to cross-examine deponents of affidavits filed in support of the petition and/or adduce oral evidence?

Going through the petition and the affidavits filed by both sides one cannot avoid noting the tirade of accusations made by each side against the other and cannot but conclude that there is clearly no love lost between the two partners and that there is a total lack of mutual confidence and that there is no way in which they could continue to function as shareholders, equal or otherwise. In other words, there certainly appears to be a deadlock. Deadlock is perhaps the most common ground to seek winding up on just and equitable grounds.

Dato' Vadiveloo leading for Kow Kek Hing contends that the Court has the power in a s. 218 petition to refuse to order winding up and instead order one or more members of the company to sell his or their shares to other members - in this case the petitioner to sell his shares to Kow - and thereby resolve the deadlock situation and save the company. Winding up, he says, should be a last resort remedy.

The relationship between members of a corporation and between the corporation and its members is substantially contractual. The terms of the contract are governed by the normal laws pertaining to contracts but are also subject to the Companies Act which does have provisions for the interference by the Courts with the inherent right of freedom to contract but such interference is minimal. Such interference by the Court with the contractual

relationship can only be successfully sought if there are statutory provisions allowing for such interference. One such interference with the terms of the contractual relationship in this context is that provided by s. 181(2). Although what is envisaged when a company is incorporated is that members of the company would have the conduct of the company's affairs, the views of the majority to prevail in the event of lack of consensus, where there is oppression the Court is specifically and expressly empowered to interfere with majority rule and may *inter alia* regulate the conduct of the affairs of the company and even direct the compulsory purchase of shares of one member by others. It is to be emphasised that the s. 181(2) extreme measures may be resorted to by the Courts only on the application of a member, the holder of a debenture, the Minister and only where there is oppression as defined in s. 181(1)(a) and (b).

The first question posed for the resolution here is whether the Court has similar power in a s. 218 application. Section 218 and the related section thereto fall within Part X of the Act which deals with the winding up of companies.

Dato' Vadiveloo submits that s. 221(1) allows the Court, on the hearing of a winding up of a s. 218 petition to make any order it thinks fit **carte blanche**. The relevant portion of s. 221(1) are as follows:

> 221.(1) On hearing a winding up petition the Court may dismiss it with or without costs or adjourn the hearing conditionally or unconditionally or make any interim or other order that it thinks fit.

The said portion of s. 221(1) consists of 3 limbs *viz*:

On hearing the petition the Court may:

(1) dismiss it with or without costs; or

(2) adjourn the hearing conditionally or unconditionally; or

(3) make any interim or other order.

It is to be noted that the arrangements of the words used make it clear that "with or without costs", has reference to the power to dismiss the petition, "conditionally or unconditionally "to the power to adjourn the hearing and it follows that "or other order" has reference to the power to the Court to make any interim order. It is also to be noted that some further support for the view that "or other order" relates to "interim" order has no general application is obtained from the fact that the phrase used is "make any interim or other order" and not "make any interim order" and have a 4th limb to the sub-section *viz*. "or (4) make any other order".

As I have pointed out earlier herein where statutory powers are designed to interfere with basic and inherent rights of parties they must be clearly and expressly stated as has been done in s. 181(2). Particularly as the legislation in giving such a power to the Court in one section, namely, s. 181 had expressly stated the terms of the power and it has not done so in another section of the same statute leads to the inference that it was not intended that such power be given in relation to that latter section.

In my judgment on a true construction of s. 221(1) the Court has no jurisdiction to order that one member sell his shares in the company or purchase the shares of another.

As to the question of cross-examination of witnesses and the adducing of oral evidence, I have earlier overruled the submissions made on behalf of Mr. Kow that the Court has no discretion to disallow the application to cross-examine and/or adduce oral evidence. This is

not a writ action. It is a petition which is required to be supported by an affidavit or affidavits. Those opposing it may file and have read at the hearing affidavits in opposition. Applications may be made to have oral testimony adduced and for cross-examination of deponents of affidavits. Whether the Court will allow such applications is entirely in the discretion of the Court.

Here the basis for the petitioner's application is deadlock. If there is deadlock who is at fault is not relevant. I saw no call to use a number of precious days of judicial time for going through what could prove to be something of an academic exercise. If the petitioner could not satisfy the Court with affidavits that there was a deadlock situation, the petition would no doubt be dismissed and probably with costs.

Accordingly it was my ruling that in a s. 218 petition the Court has no jurisdiction to order one member to sell his shares in the company or purchase the shares of another. I also refused to allow Mr. Kow and/or for his witnesses to adduce oral testimony. I also refused the application to cross-examine the deponents of the affidavits in support of the petition. I finally ordered that the costs of and incidental to these preliminary points be paid by Mr. Kow. I adjourned the hearing of the petition to 18 April 1990.

Also found at [1991] 3 CLJ 1895